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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 171

THE UNITED STATES OF AMERICA,
Appellant,

vs.

JOE BURNISON AND PHIL C. KATZ, PUBLIC ADMINISTRATOR OF THE CITY AND COUNTY OF SAN FRANCISCO.

APPEAL FROM THE SUPREME COURT OF THE STATE OF CALIFORNIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS OR AFFIRM

CASPER A. ORNBAUN,
HARRY N. GROVER,
EVERETT H. ROAN,
Counsel for Appellee, Joe Burnison.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 171

IN THE MATTER OF THE ESTATE OF GUST BURNISON, ALSO CALLED GUSTAV BURNISON, DECEASED

THE UNITED STATES OF AMERICA,
Appellant,

vs.

JOE BURNISON AND PHIL C. KATZ, PUBLIC ADMINISTRATOR OF THE CITY AND COUNTY OF SAN FRANCISCO,
Appellees

ANSWER AND OPPOSITION TO APPELLANT'S PETITION FOR APPEAL TO THE SUPREME COURT OF THE UNITED STATES

and

MOTION FOR THE DISMISSAL OF SAID PETITION OF APPEAL

and

MOTION FOR AFFIRMANCE OF THE JUDGMENT OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

To the Honorable Fred M. Vinson, Chief Justice, and to the Honorable Associate Justices of the Supreme Court of the United States:

Now comes Joe Burnison, one of the above named appellees, pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States, as amended, and

in oppposition to the granting of, and in reply to the Petition for Appeal to the Supreme Court of the United States filed by the above named appellant respectfully represents as follows:

The Facts

The facts are as stated in the introductory paragraph of the opinion of the Supreme Court of the State of California:

> "This is an appeal from an order denying distribution of the decedent's estate to his heirs—three brothers, a sister, and thirteen nieces and nephews—and sustaining the objections of the United States of America, the sole beneficiary under the terms of the will. The entire estate—consisting of personal property appraised at $22,668.70—was left to "The United States government U.S.A." Appellant maintains that the 'United States of America is not authorized by statute or otherwise to take under a will executed in the State of California by a resident' thereof, that the testamentary 'bequest' is therefore 'void', and that all of the estate should be distributed to the 'heirs at law of deceased under and pursuant to the laws of succession of' this state. His position is well taken under the prevailing statutory law applicable in determination of the issue involved."

Question Presented by Petition for Appeal

The only question presented by the said petition for appeal is as to the constitutionality of Section 27 of the Probate Code of the State of California, which designates those who may take under a will executed in the State of California and reads as follows:

> "*Who may take by will.* A testamentary disposition may be made to the state, to counties, to municipal corporations, to natural persons capable by law of taking the property, to unincorporated religious, benevolent or fraternal societies or associations or

lodges or branches thereof, and to corporations formed for religious, scientific, literary, or solely educational or hospital or sanatorium purposes, or primarily for the public preservation of forests and natural scenery, or to maintain public libraries, museums or art galleries, or for similar public purposes. No other corporation can take under a will, unless expressly authorized by statute."

Appellant contends that said statute is unconstitutional as regards the Constitution of the United States of America, and asserts that a substantial question is involved in this proceeding for the following reasons:

(1) That "the United States as a body politic established by the Constitution has capacity, by virtue thereof, to receive voluntary bequests and devises, as an incident to that sovereignty" (p. 6, Appellant's Statement as to Jurisdiction); and

(2) That "the power of the states over the descent of property is limited by the Constitution" (p. 10, Appellant's Statement as to Jurisdiction); and

(3) That Section 27 of the Probate Code of California discriminates "against the United States in violation of Article VI of the Constitution" (p. 13, Appellant's Statement as to Jurisdiction).

The Honorable Supreme Court of the United States of America Has No Jurisdiction to Entertain an Appeal in This Proceeding.

The Honorable Supreme Court of the United States has no jurisdiction to entertain an appeal in this proceeding, which involves Section 27 of the Probate Code of the State of California governing the devolution of property by a will executed in said State.

A state statute may not be declared to be unconstitutional, as regards the Constitution of the United States,

unless it encroaches upon a subject governed by the said Constitution.

Authorities are legion to the effect that the Constitution of the United States is a grant of powers, and that the federal government can exercise no powers except those specifically enumerated in the Constitution of the United States and such implied powers as are necessary and proper to carry into effect and enumerated powers.

We quote the following pertinent language from the opinion of the Supreme Court of the United States in the case of *United States* v. *Curtiss-Wright Export Corp.*, 299 U. S. 304, 315, 316 (year 1936):

> "It will contribute to the elucidation of the question if we first consider the differences between the powers of the federal government in respect of foreign or external affairs and those in respect of domestic or internal affairs. That there are differences between them, and that these differences are fundamental, may not be doubted.
>
> "The two classes of powers are different, both in respect of their origin and their nature. *The broad statement that the federal government can exercise no powers except those specifically enumerated in the Constitution, and such implied powers as are necessary and proper to carry into effect the enumerated powers, is categorically true only in respect of our internal affairs. In that field, the primary purpose of the Constitution was to carve from the general mass of legislative powers then possessed by the states such portions as it was thought desirable to vest in the federal government, leaving those not included in the enumeration still in the states.* Carter *v.* Carter Coal Co., 298 U. S. 238, 294." (Emphasis ours.)

Since the year 1850 it has been the rule established by the Supreme Court of the United States that the devolution of property by will is a matter to be regulated exclusively by the Legislatures of the several states as regards real

and personal property within their dominions, and that there is nothing in the Constitution of the United States to prevent the several states from designating who may or may not take by a will executed in the particular state jurisdiction with reference to property situated within said jurisdiction, and further that the right to take property by devise or bequest under a will is not an inherent right of citizenship, but is a creature of statute, to be granted or denied by the Legislature of the particular State involved.

In *Mager* v. *Grima*, 49 U. S. 489, 492 (8 Howard) (year 1850), the Honorable Supreme Court of the United States states as follows:

> *"Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property, real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it."* (Emphasis ours.)

And we quote from the following cases decided by the Supreme Court of the United States:

> *United States* v. *Fox*, 94 U. S. 315 at 321 (year 1876): "Statutes of wills, as is justly observed by the Court of Appeals, are enabling acts, and prior to the statute of 32 Hen. VIII there was no general power at common law to devise lands. The power was opposed to the feudal policy of holding lands inalienable without the consent of the lord. The English Statute of Wills became a part of the law of New York upon the adoption of her Constitution, in 1777; and, with some modifications in its language, remains so at this day. *Every person must, therefore, devise his lands in that State within the limitations of the statute or he cannot devise them at all.* His power is bounded by its conditions. That "statute provides that a devise of lands may be made 'to any person capable by law of holding real estate; but no devise to a corporation shall be

valid unless such corporation be expressly authorized by its charter or by statute to take by devise.'

The term 'person' as here used applies to natural persons, and also to artificial persons,—bodies politic, deriving their existence and powers from legislation, —but cannot be so extended as to include within its meaning the Federal government. It would require an express definition to that effect to give it a sense thus extended. And the term 'corporation' in the statute applies only to such corporations as created under the laws of the State. It was so held by the Court of Appeals in White *v.* Howard, 46 N.Y. 164, 165, and its construction of the statute is conclusive upon us." (Emphasis ours.)

Maxwell v. *Bugbee*, 250 U. S. 525 at 536 (year 1919):

"*The right to inherit property, or to receive it under testamentary disposition, has been so frequently held to be the creation of statutory law, that it is quite unnecessary to cite the decisions which have maintained the principle.*" (Emphasis ours.)

Lyeth v. *Hoey*, 305 U. S. 188 at 193 (year 1938):

"*Undoubtedly the state law determines what persons are qualified to inherit property within the jurisdiction.* Mager *v.* Grima, 8 How. 490, 493; Maxwell *v.* Bugbee, 250 U. S. 525, 536, 537. *The local law determines the right to make a testamentary disposition of such property and the conditions essential to the validity of wills, and the state courts settle their construction.* Uterhart *v.* United States, 240 U. S. 598, 603." (Emphasis ours.)

Irving Trust Co. v. *Day*, 314 U. S. 556, 62 S. Ct. 398, 86 L. Ed. 452, 137 A.L.R. 1093, 1098 (year 1942):

"Rights of succession to the property of deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance. *Nothing in the Federal Constitution forbids the legislature of a state to limit, condition or even*

abolish the power of testamentary disposition over property within its jurisdiction. Mager *v.* Grima, 8 How. (U.S.) 490, 12 L. Ed. 1168; United States *v.* Fox, 94 U. S. 315, 24 L. Ed. 192; United States *v.* Perkins, 163 U. S. 625, 41 L. Ed. 287, 16 S. Ct. 1073; cf. Randall *v.* Kreiger, 23 Wall. (U.S.) 137, 148, 23 L. Ed. 124, 126." (Emphasis ours.)

Clark v. *Allen;* 331 U. S. 503 at 517 (year 1947):

"*Rights of succession to property are determined by local law. See Lyeth* v. *Hoey,* 305 U. S. 188, 193; Irving Trust Co. *v.* Day, 314 U. S. 556, 562. Those rights may be affected by an overriding federal policy, as where a treaty makes different or conflicting arrangements. Hauenstein *v.* Lynham, supra. Then the state policy must give way. Cf. Hines *v.* Davidowitz, 312 U. S. 52. *But here there is no treaty governing the rights of succession to the personal property. Nor has California entered the forbidden domain of negotiating with a foreign country,* United States *v.* Curtiss-Wright Corp., 299 U. S. 304, 316-17, *or making a compact with it contrary to the prohibition of Article I. Section 10 of the Constitution.* What California has done will have some incidental or indirect effect in foreign countries. But that is true of many state laws which none would claim cross the forbidden line." (Emphasis ours.)

The case last cited is heavily relied upon by appellant in its statement of jurisdiction, page 10, but the quotation there set forth is not complete. The complete statement quoted above sustains appellee's position that no constitutional question is involved in this proceeding and that this Honorable Court has no jurisdiction in the matter.

The Supreme Courts of the several states consistently have followed the rule established by the decisions of the Supreme Court of the United States, and the decisions

of other states subscribing to the principles enunciated therein, and we quote as follows:

"*Taylor* v. *Payne* (Fla.), 17 So. (2d) 615, 154 A. L. R. 677, 679:

'The right to receive or dispose of property by last will and testament is not an inherent right, nor is it one that is guaranteed by the fundamental law. *Nowhere in the Federal Constitution is there any attempt to treat of the matter of disposition of property by will, no reference being made to the subject of testamentary alienation of property, either directly or by implication.* And except as the power to will property has been limited indirectly by Article X of the Constitution of Florida, which inhibits the alienation of homestead property by will where the owner thereof has children in esse, no effort at constitutional regulation of the subject has been made by the people of the State of Florida. *Therefore, the right of testamentary disposition of property does not emanate from the organic law, as contended by counsel, but is a creature of the law derived solely from statute without constitutional limitation.* Accordingly, the right is at all times subject to the regulation and control by the legislative authority which creates it. *The authority which confers the right may impose conditions thereon, such as limiting disposition to a particular class* or fixing the time which must ensue subsequent to the execution of the will before gifts to a particular class shall be deemed valid; or the right to dispose of property by will may be taken away altogether, if deemed necessary, without private or constitutional rights of the citizen being thereby violated. Thomas v. Williamson, 51 Fla. 332, 40 So. 831, 834; Patton v. Patton, 39 Ohio St. 590, 596; In re Noves' Estate, 40 Mont. 178, 105 P. 1013; In re Beck's Estate, 44 Mont. 561, 121 P. 784, 1057; In re Walker's Estate, 110 Cal. 387, 42 P. 815, 1082, 30 LRA 460, 52 Am. St. Rep. 104; Redfearn on Wills and Administration of Estates in Florida, pp. 42 et seq." (Emphasis ours.)

Hazard v. *Bliss*, 43 R. I. 43, 113 Atl. 469, 23 A. L. R. 826, 837:

"• • • the right to take property by descent or devise is not a natural one, but is a privilege granted by the state upon such condition as it may impose and subject in all respects to its regulation. Magoun *v.* Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037, 18 Sup. Ct. Rep. 594."

McDermid v. *Bourhill*, 101 Ore. 503, 199 Pac. 610, 22 A. L. R. 428, at 432:

"*It has been definitely settled that the right to take property by devise or descent is the creature of law, and not a natural right.* Magoun *v.* Illinois Trust & Sav. Bank, 170 U. S. 283, 42 L. Ed. 1037, "18 Sup. Ct. Rep. 594; United States *v.* Perkins, 163 U. S. 625, 41 L. Ed. 287, 16 Sup. Ct. Rep. 1073; Carpenter *v.* Pennsylvania, 17 How. 456, 15 L. Ed. 127; Knowlton *v.* Moore, 178 U. S. 41, 44 L. Ed. 969, 20 Sup. Ct. Rep. 747, and extensive list of cases collected in note found in 9 Ann. Cas. 711. It has been stated: 'In most jurisdictions in the United States, it is apprehended, the capacity to make a will, whether of real estate or personalty, depends entirely on statute. The legislature has plenary power to withhold or grant the right, and, if it grants it, it may make its exercise subject to such regulations and requirements as it pleases.' 40 Cyc. 997." (Emphasis ours.)

Beck's Estate, 44 Mont. 561, 121 Pac. 784, at 786:

"The right to make testamentary disposition of property depends entirely upon the will of the Legislature. It may withhold the right altogether, or impose any limitations or conditions upon it which it chooses. In re Noyes' Estate, 40 Mont. 178, 105 Pac. 1013. *A necessary postulate of this proposition is that the Legislature has the exclusive power to designate those whom the testator may make the objects of his bounty.*" (Emphasis ours.)

In view of these decisions, it cannot possibly be contended that section 27 of the Probate Code of the State of California violates the Constitution of the United States, if the United States Government be excluded from its purview. The United States Government is definitely excluded. Had it been the intention of the Legislature of the State of California to include the United States Government in said section, the United States Government would have been named as the first taker under the rule stated in *Davis* v. *Pringle*, 268 U. S. 315 at 318, as follows:

> "The ordinary dignities of speech would have led to the mention of the United States at the beginning of the clause if within its purview."

In rendering its very clear opinion on the issues involved in the present case, the Honorable Supreme Court of the State of California cited federal and state decisions directly in point and attention is respectfully invited to said opinion.

Section 27 of the Probate Code of the State of California Does Not Constitute an Unlawful Discrimination Against the United States.

Since the Supreme Court of the United States has conclusively decided that the matter of the devolution of property is a subject to be handled exclusively by the Legislatures of the several states, there is no basis for appellant's claim that section 27 of the Probate Code of the State of California unlawfully discriminates against the United States.

Said code section (quoted supra) enumerates those who may take by a will executed in California. The United States is not named as one who may take, and was intentionally excluded by the Legislature of California. Said Legislature had full power and authority to exclude the United States.

This contention of appellant is well answered by the opin-

ion of the Supreme Court of the State of California in the present case where it is stated:

> "The Government's contention that if Section 27 of the Probate Code should be construed as invalidating the bequest in question, 'serious constitutional questions would arise' involving an 'unlawful discrimination against the United States' it is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, supra, and the claim that assuming 'the Fox case cannot be distinguished, it must be regarded as overruled' are without force in view of its citation as recently as 1942 by the Supreme Court as noted.
>
> *Nor does the reference in the last sentence of section 27 of the Probate Code to the testamentary capacity of a 'corporation . . . expressly authorized by statute' aid the Government* in its attempt to uphold the validity of the bequest in question. Whether or not the word 'corporation' is such 'legislative environment' would include the United States as a 'governmental body' (see State of Ohio *v.* Helvering, 292 U. S. 360, 370; State of Georgia *v.* Evans, 316 U. S. 160, 161), *"the further requirement of the section is concededly unsatisfied in the Government's admission that though 'various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses . . . no Federal statute of general application has purported to authorize the United States to so acquire property.'* It is true that the capacity of the United States to 'receive a voluntary devise of bequest' has been regarded as an 'inherent attribute of sovereignty' and so sustained as an implied power of the federal government, but such principle has no force where there is an 'express statute' of the state wherein 'the testator had his domicil' effecting 'a restriction as to who may be devisees or legatees.' (Dickson *v* United States, 125 Mass. 311, 315.) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state

having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take 'under a will.' (United States *v.* Fox, supra, 94 U. S. 315; United States *v.* Perkins, supra, 163 U. S. 625; Irving Trust Co. *v.* Day, supra, 314 U. S. 556.)" (Emphasis ours.)

No Substantial Question Is Presented by Appellant in This Proceeding

Appellee respectfully contends that no substantial question is presented by appellant in this proceeding, and that unless this Honorable Court grants the motion of appellee hereinafter contained for a dismissal of this proceeding or an affirmance of the judgment of the Supreme Court of the State of California it will be necessary for this Court to retrace the ground covered by the California Supreme Court, only, we believe, to arrive at the same conclusions as those arrived at by the California Supreme Court.

The question here is not as to the power of the United States to accept a voluntary bequest—*The question is as to the power of the State of California by statute to designate those who may take by a will executed in said State of California.*

All of the decisions of the Supreme Court of the United States and of the Supreme Court of the State of California, as well as those of other states (see authorities above cited and quoted from), unqualifiedly sustain the power of the State of California, by statute, to control the devolution of property by will.

Again we quote from the opinion of the Honorable Supreme Court of the State of California in the present case:

"The Government's contention that if section 27 of the Probate Code should be construed as invalidating the bequest in question, 'serious constitutional questions would arise' involving an 'unlawful discrimina-

tion against the United States' is effectively answered by the Irving Trust Co. case as above quoted. Likewise the attack upon the pertinency of the basic reasoning in the Fox case, supra, and the claim that assuming 'the Fox case cannot be distinguished, it must be regarded as overruled' are without force in view of its citation as recently as 1942 by the Supreme Court as noted.

"*Nor does the reference in the last sentence of section 27 of the Probate Code to testamentary capacity of a 'corporation * * * expressly authorized by statute' aid the Government* in its attempt to uphold the validity of the bequest in question. Whether or not the word 'corporation' in such 'legislative environment' would include the United States as a 'governmental body' (see State of Ohio v. Helvering, 292 U. S. 360, 370; State of Georgia v. Evans, 316 U. S. 160, 161), *the further requirement of the section is concededly unsatisfied in the Government's admission that though 'various Federal statutes enacted from time to time have authorized particular agencies of the Government to acquire property by will and to apply it to stated uses * * * no Federal statute of general application has purported to authorize the United States to so acquire property.'* It is true that the capacity of the United States to 'receive a voluntary devise of bequest' has been regarded as an 'inherent attribute of sovereignty' and so sustained as an implied power of the federal government, but such principle has no force where there is an 'express statute' of the state wherein 'the testator had his domicil' effecting 'a restriction as to who may be devisees or legatees.' (Dickson *v.* United States, 125 Mass. 311, 315.) In short, the entire matter of the right of testamentary disposition appears to be one within the control of the state having jurisdiction of the property in question, and there is no constitutional requirement that the state allow the United States to take 'under a will'. (United States *v.* Fox, supra, 94 U. S. 315; United States *v.* Perkins, supra, 163 U. S. 625; Irving Trust Co. *v.* Day, supra, 314 U. S. 556.)." (Emphasis ours)

There can be no question as to discrimination against the United States under the provisions of Article VI of the Constitution of the United States. The pertinent part of said article reads as follows:

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

There is however nothing in the United States Constitution or in any Federal statute which governs the devolution of property by will. The several States have always had and still have the power, by statute to designate the persons who may take by will.

Appellant relies upon *Dickson* v. *United States,* 125 Mass. 311. In that case, the Court states:

> "The decision in United States *v.* Fox, 94 U. S. 315, affirming S. C. 52 N. Y. 530, by which it was held that a devise by a citizen of New York of real estate in New York to the government of the United States was void, proceeded upon the ground that the law of New York allowed real estate to be devised only to natural persons and to corporations established by the Legisture of that state. That decision has no application to this case. *The statutes of this Commonwealth where the testator had his domicil, and part of his real estate lay, make no restriction as to who may be devisees or legatees; and there is no evidence before us that any such restriction is made by the laws of Iowa, where the rest of the real estate is situated.* Gen. Sts. c 92, §§ 1, 2. Jackson *v.* Phillips, 14 Allen, 539, 552, 589, 591. Fellows *v.* Miner, 119 Mass. 541. Lorings *v.* Marsh, 6 Wall. 337, 355. Ould *v.* Washington Hospital, 95 U. S. 303." (Emphasis ours)

We respectfully submit that it would be contrary to the democratic principles forming the basis of the government of the United States to endorse a policy which would permit said Government, under the guise of "the general right of sovereignty," to ignore the limitations of the Constitution of the United States and encroach upon the domain of the State of California.

We further respectfully submit that no Federal question, is presented in this proceeding, and that said proceeding should be dismissed or the judgment of the Honorable Supreme Court of the State of California should be affirmed.

CASPER A. ORNBAUN,
Attorney for Joe Burnison, Appellee.
HARRY N. GROVER,
EVERETT H. ROAN,
Of Counsel.

MOTION FOR DISMISSAL OF PETITION FOR APPEAL OR AFFIRMANCE OF JUDGMENT OF THE SUPREME COURT OF THE STATE OF CALIFORNIA

Appellee Joe Burnison moves the above entitled Court to dismiss the Petition For Appeal on file herein, or to affirm the judgment of the Supreme Court of the State of California involved herein, on the grounds that no Federal question is involved, that no constitutional question is involved, and that no substantial question is presented, as more fully appears from the record on file herein, particularly including the Statement As To Jurisdiction filed by the appellant, and the appellee's Answer and Opposition to said Petition for Appeal.

Casper A. Ornbaun,
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Harry N. Grover,
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Of Counsel.